LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 23 1969
JOHN F. DAVIS, CLERK

NO. [redacted]
89

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

LESTER NEHRING, *Petitioner*

-versus-

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL., *Respondents*

BRIEF OF RESPONDENT STRACHAN SHIPPING COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT EIKEL
205 Oil & Gas Building
Houston, Texas 77002
Attorney for Respondent
Strachan Shipping Company

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinions In The Courts Below	2
Statutes and Rules Involved	2
Questions Presented	3
Statement of the Case	3
Argument	6
a. There Was No Error In The Court's Allowing Each Party The Three Peremptory Challenges To Which They Were Entitled By Statute	6
b. There Can Be No Doubt The Ends Of Justice Were Served By Refusing Separate Trials	7
c. The Charge To The Jury Was Full And Fair, And the Trial Court Was Clearly Right In Declining To Give The Verbose And Confusing Requested Definition Of The Common Term "Injury"	8
Conclusion	9
Appendix A:	
Court's Charge to the Jury (Reporter's Transcript, pp. 596-620)	A1
Supplemental Charge (Reporter's Transcript, pp. 632, 633)	A19

INDEX OF AUTHORITIES

CASES	Page
Burns v. Travelers Insurance Company, 344 F.2d 70, 74 (5 Cir. 1965)	8
Cherry v. Stedman, 259 F.2d 774, 777-778 (8 Cir. 1958)	8

CASES

	Page
Dery v. Wyer, 265 F.2d 804, 806-807 (2 Cir. 1959)	7
Falls Industries, Inc. v. Consolidated Chemical Industries, Inc., Et Al., 258 F.2d 277, 283 (5 Cir. 1958)	7
Southern Railway Company v. Shealey, 382 F.2d 752, 755 (5 Cir. 1967)	8
The Indianapolis & St. Louis Railroad Company v. Horst, 93 U.S. 291, 23 L.Ed. 898, 899 (1876)	8
United States v. Yellow Cab Company, 340 U.S. 543, 556, 71 S.Ct. 399, 407 (1951)	7
Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438 (1958)	7

STATUTES AND RULES

28 U.S.C. §1870	2, 6
Rule 14(a), F.R.C.P.	7
Rule 20(b), F.R.C.P.	2
Rule 42(b), F.R.C.P.	2
Rule 49(a), F.R.C.P.	3, 5

NO. 1311

IN THE

Supreme Court of the United States

October Term, 1968

LESTER NEHRING, *Petitioner*

-versus-

EMPRESA LINEAS MARITIMAS ARGENTINAS, ET AL., *Respondents*

BRIEF OF RESPONDENT STRACHAN SHIPPING COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Strachan Shipping Company, the stevedoring company engaged by the owner of the M/V RIO BERMEJO, respondent Empresa Lineas Maritimas Argentinas, to discharge cargo from that vessel and the employer of petitioner Nehring opposes the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals is reported at 401 F.2d 767. The judgment of the Trial Court was based upon a jury verdict, and therefore no written opinion was rendered by that court.

STATUTES AND RULES INVOLVED

28 U.S.C. §1870:

> "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> "All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub.L. 86-282, 73 Stat. 565."

Federal Rules of Civil Procedure:

> "Rule 20. Permissive Joinder of Parties
>
> "(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."
>
> "Rule 42. Consolidation; Separate Trials
>
> "(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and econ-

omy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. As amended Feb. 28, 1966, eff. July 1, 1966."

"Rule 49. Special Verdicts and Interrogatories

"(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

QUESTIONS PRESENTED

1.

Whether it was error for the trial court to refuse plaintiff more than the three peremptory juror challenges

accorded each party by statute and to decline to treat the other two parties as one and allow the two only three peremptory challenges, contrary to statute.

2.

Whether the trial court abused its discretion in declining to order a separate trial between defendant and the impleaded third-party defendant, where the only ground urged by plaintiff for such separate trial was that he desired the court to allow peremptory juror challenges contrary to statute.

3.

Whether it was error to refuse a verbose and confusing definition of the common word "injury", where the trial court gave a full and fair charge on the entire case and the jury found in response to a special interrogatory part of such charge that plaintiff sustained no injury.

STATEMENT OF THE CASE

Petitioner brought this suit against respondent shipowner-operator Empresa Lineas Maritimas Argentinas to recover damages for an injury he claimed he sustained while employed by the stevedore Strachan Shipping Company as a longshoreman at work on the vessel. The usual allegations that the shipowner was negligent and its vessel unseaworthy were made.

The shipowner thereafter impleaded the stevedore-employer. It denied its own liability and the allegations made against it but sought alternatively indemnity from the stevedore if the jury should find contrary to its answer

that the plaintiff was injured while aboard its vessel, such indemnity being sought on the ground that any injury would have been caused by breach of the stevedore's warranty of workmanlike performance. Costs and attorneys fees were sought also.

The principal contention of defendant, and of the impleaded third-party defendant Strachan, was that the plaintiff sustained no injury on the vessel. Much evidence was introduced to support this contention. The trial court gave a detailed and comprehensive charge (printed hereinbelow as Appendix A) and submitted special interrogatories to the jury in accordance with Rule 49(a), F.R.C.P. The first interrogatory inquired whether petitioner sustained "an injury while working aboard the RIO BERMEJO on or about January 9, 1964". The jury answered this "No". R. 71. Final judgment was thereafter entered denying plaintiff petitioner's claim against the shipowner and denying the shipowner's claim over against the stevedore Strachan. R.77.

Petitioner contended on his appeal to the Court of Appeals for the Fifth Circuit that the trial judge erred in declining to define for the jury the term "injury", used in the first special interrogatory, and in refusing to allow him six peremptory challenges or if not so allowed to allow the defendant and impleaded defendant together only three, the same as plaintiff, or for a separate trial between the two defendants if plaintiff's motion on challenges was not granted. The Court of Appeals, in a per curiam opinion, held that there was no merit to either contention and unanimously affirmed the judgment of the trial court. Petitioner's motion for rehearing was denied.

ARGUMENT

a. There Was No Error In The Court's Allowing Each Party The Three Peremptory Challenges To Which They Were Entitled By Statute.

The statute, 28 U.S.C. §1870, explicitly provides that "each party shall be entitled to three peremptory challenges". Here certainly there were three separate parties, and while to the plaintiff the defendant shipowner and third-party defendant stevedore may have appeared as a common adversary, particularly since each vigorously contended plaintiff sustained no injury, certainly as between themselves the two were clearly adversaries. As to these two parties, for the Court to have held they were legally one party would have been to deny to each the three challenges granted them by statute and would have been grossly unfair to them vis-a-vis each other, and it can hardly be argued to the contrary.

Indeed it appears plaintiff realized this was the case, for alternatively to his request for unfair treatment with respect to challenges between the defendants he requested for himself preferential treatment in the form of three additional challenges, a request plainly contrary to the explicit language of the statute which allows one party only three peremptory challenges.

There can be no reasonable construction of the statute to base a contention that a single party, as of course the plaintiff was here, shall have *six* peremptory challenges!

And as is perfectly clear in these cases, the rights and contentions of the defendant and third-party defendant vis-a-vis each other would make it a plain abuse of judicial discretion to treat them as one and on such basis allow these separate parties only three challenges to be

jointly exercised. Which party would be granted the three in case they could not agree as to the exercise of their thus imposed "joint rights"?

The plaintiff cites no authority for his attempt to obtain twice as many peremptory challenges as the statute provides he is entitled to be allowed, and it would be plainly unfair to give him such an advantage in the selection of a jury as plaintiff here contends he should have received.

b. There Can Be No Doubt The Ends Of Justice Were Served By Refusing Separate Trials.

This Court has clearly decided that the third-party procedure provided for by Rule 14(a), F.R.C.P., is intended to facilitate the trial of causes where there are multiple claims, *United States v. Yellow Cab Company*, 340 U.S. 543, 556, 71 S.Ct. 399, 407 (1951). Particularly is this the case where the evidence would be essentially the same and delay and expense can be avoided by a single trial. *Dery v. Wyer*, 265 F.2d 804, 806-807 (2 Cir. 1959); *Falls Industries, Inc. v. Consolidated Chemical Industries, Inc., Et Al.*, 258 F.2d 277, 283 (5 Cir. 1958).

Here, even under his distorted interpretation of this Court's decision in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438 (1958), the plaintiff did not contend below and does not here contend that the single trial here did not avoid delay and expense: Such a contention would have been manifestly absurd.

What he asked for alternatively below and does contend here is that if he were not to be allowed to secure an unfair advantage by being given twice the peremptory challenges accorded him by statute, or an equally unfair

advantage by denying to one of the other parties the three challenges the statute granted it, then there should have been separate trials.

There is no authority for such a proposal, and the suggestion that the trial court abused the discretion given it by the Rules in rejecting plaintiff's alternative proposal is plainly completely without any reasonable or even argumentative ground.

c. The Charge To The Jury Was Full And Fair, And The Trial Court Was Clearly Right In Declining To Give The Verbose And Confusing Requested Definition Of The Common Term "Injury".

Printed as an appendix hereto is the charge of the trial court, which even a cursory reading shows was just and fair to all of the parties.

A trial court is of course under no greater duty than to give a full and fair charge, such as was here given. *The Indianapolis & St. Louis Railroad Company v. Horst,* 93 U.S. 291, 23 L.Ed. 898, 899 (1876); *Southern Railway Company v. Shealey,* 382 F.2d 752, 755 (5 Cir. 1967).

On the other hand, it is equally plainly settled the Court is under no duty to give an instruction (or definition) not entirely correct, or so framed as to be confusing or to be misunderstood. *Burns v. Travelers Insurance Company,* 344 F.2d 70, 74 (5 Cir. 1965); *Cherry v. Stedman,* 259 F.2d 774, 777-778 (8 Cir. 1958).

And, it is with respect submitted, there can be no doubt that the definition of the word "injury" requested could have only hopelessly confused a jury asked simply whether

the plaintiff received an injury, the real issue in the case. As the Court of Appeals has here pointed out:

> "It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this Court finds that the jury was fairly instructed."

CONCLUSION

The issues here sought reviewed involve no important questions of law, either statutory or decisional, and no conflicts between decisions of Courts of Appeal. In reality review is sought of rulings plainly right, which certainly could not be deemed abuses of a trial judge's discretion, and which were made fairly and in accordance with the applicable statute and Rules. It is therefore respectfully submitted the petition should be in all things denied.

Respectfully submitted,

ROBERT EIKEL
EIKEL & GOLLER